

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JUDY L. BAILEY, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cincinnati, OH, Employer**

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**Docket No. 04-1690  
Issued: December 7, 2004**

*Appearances:*  
*Judy L. Bailey, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
DAVID S. GERSON, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On June 24, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated October 30, 2003. Appellant also appealed a December 2, 2003 decision which denied her reconsideration request without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

**ISSUES**

The issues on appeal are: (1) whether appellant has met her burden of proof in establishing that she sustained a tear of the right rotator cuff in the performance of duty; and (2) whether the Office properly denied appellant's request for reconsideration.

**FACTUAL HISTORY**

On September 17, 2003 appellant, then a 36-year-old letter carrier, filed a claim alleging that on January 12, 2003 she sustained a tear of the right rotator cuff while reaching for mail. Appellant did not stop work.

Appellant submitted a certificate of professional care dated January 27, 2003, prepared by Dr. Clyde E. Henderson, a Board-certified orthopedist, who noted that appellant was off work until February 17, 2003 and could resume light duty at that time with various lifting restrictions.

By letter dated September 26, 2003, the Office asked appellant to submit additional information including a comprehensive medical report from her treating physician which included a reasoned explanation as to how the specific work factors or incidents identified by appellant had contributed to her claimed right shoulder injury.

Appellant submitted several reports from Dr. Henderson dated January 27 to September 26, 2003. In his report of January 27, 2003, he diagnosed minimal degenerative changes of the acromioclavicular joint. On February 3, 2003 Dr. Henderson diagnosed a mass of the right anterior ankle, impingement syndrome of the right shoulder and a partial thickness rotator cuff tear of the right shoulder. He noted positive physical findings upon examination of the right ankle and right shoulder. On February 17, 2003 Dr. Henderson noted treating appellant for persistent pain in her right shoulder and ankle. He noted that a magnetic resonance imaging (MRI) scan of the right foot revealed anterior tibialis tendon tenosynovitis. Dr. Henderson diagnosed right shoulder impingement and anterior tibialis tendon tenosynovitis of the right foot. On March 27, 2003 he noted that appellant was permitted to return to work without restrictions; however, she chose not to return. Dr. Henderson diagnosed impingement of the right shoulder. In his note of August 21, 2003, he indicated that he treated appellant for persistent right shoulder pain. Dr. Henderson noted that appellant was a mail carrier and was required to carry up to 65 pounds and that appellant believed that her job was breaking her body down. He recommended right shoulder arthroscopic and decompression surgery. In an operative report dated September 10, 2003, Dr. Henderson noted performing arthroscopic surgery of the right shoulder and diagnosed right shoulder subacromial bursitis and right rotator cuff tear. On September 22, 2003 he advised that appellant was progressing post surgery and was undergoing physical therapy. An MRI scan dated January 30, 2003 revealed mild tendinosis and peritendinobursitis within the right cuff with a small partial thickness tear. An undated certificate of a health care provider noted that appellant was being treated for a right shoulder cuff tear and impingement, right knee chondromalacia and osteoarthritis and was incapacitated for intermittent periods between March 21, 2002 and April 2, 2004.

In a decision dated October 30, 2003, the Office denied appellant's claim on the grounds that the medical evidence was not sufficient to establish that her condition was caused by the factors of employment as required by the Federal Employees' Compensation Act.<sup>1</sup> The Office specifically noted that appellant's claim may be an occupational disease rather than a traumatic injury; however, appellant did not provide factual or medical evidence to support the existence of an occupational disease.

On November 17, 2003 appellant requested reconsideration and submitted additional medical evidence. Appellant submitted a duplicate copy of the MRI scan of the right shoulder dated January 30, 2003. She also submitted an MRI scan of the right ankle dated February 6,

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

2003 which revealed tenosynovitis involving the anterior tibial tendons with no split tear demonstrated.

By decision dated December 2, 2003, the Office denied appellant's reconsideration request on the grounds that her request neither raised substantive legal questions nor included new and relevant evidence and was therefore insufficient to warrant review of the prior decision.<sup>2</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

An employee seeking benefits under the Act has the burden of establishing the essential elements of his or her claim including the fact that the individual is an employee of the United States within the meaning of the Act, that the claim was filed within the applicable time limitation of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>3</sup>

In order to determine whether an employee actually sustained an injury in the performance of duty, the Office begins with an analysis of whether fact of injury has been established. Generally, fact of injury consists of two components which must be considered in conjunction with one another. The first component to be established is that the employee actually experienced the employment incident which is alleged to have occurred.<sup>4</sup> The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence. To establish a causal relationship between the condition, as well as any attendant disability, claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>5</sup>

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>6</sup> The weight of the medical evidence is determined by its reliability,

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<sup>2</sup> Appellant filed a Form CA-2, notice of occupational disease, which was received by the Office on February 23, 2004. She also submitted additional evidence. However, as the Office has not issued a final decision on the occupational disease claim, the Board does not have jurisdiction over the matter and may not consider the new evidence for the first time on appeal. See 20 C.F.R. § 501.2(c).

<sup>3</sup> Gary J. Watling, 52 ECAB 357 (2001).

<sup>4</sup> Michael E. Smith, 50 ECAB 313 (1999).

<sup>5</sup> *Id.*

<sup>6</sup> Leslie C. Moore, 52 ECAB 132 (2000).

its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

It is not disputed that the January 12, 2003 incident, reaching for mail, occurred as alleged. The Board finds, however, that the medical evidence is insufficient to establish that appellant sustained a tear of the right rotator cuff or other injury causally related to the January 12, 2003 reaching incident.

Appellant submitted several reports from Dr. Henderson dated January 27 to March 27, 2003, who noted positive physical findings upon examination of the right ankle and right shoulder and diagnosed a mass of the right anterior ankle, anterior tibialis tendon tenosynovitis of the right foot, impingement syndrome of the right shoulder and a partial thickness rotator cuff tear of the right shoulder. However, Dr. Henderson neither mentioned that appellant's condition was work related nor did he provide a rationalized opinion regarding the causal relationship between appellant's right shoulder injury and the factors of employment believed to have caused or contributed to such condition.<sup>8</sup> Therefore, these reports are insufficient to meet appellant's burden of proof.

An August 21, 2003 report from Dr. Henderson noted that appellant was a mail carrier and was required to carry up to 65 pounds. He indicated that appellant believed her job was breaking her body down. However, Dr. Henderson appears merely to be repeating the history of injury as reported by appellant without providing his own opinion regarding whether the work caused appellant's right rotator cuff tear. He did not mention the January 12, 2003 employment incident. To the extent that Dr. Henderson is providing his own opinion, he does not provide any reasoning or rationale explaining the cause of appellant's right rotator cuff tear and her employment and a medical report that does not contain such opinion is insufficient to meet appellant's burden of proof.<sup>9</sup> Appellant, therefore, submitted insufficient evidence to meet her burden of proof to establish that her right rotator cuff tear was caused by the January 12, 2003 employment incident.

An award of compensation may not be based on surmise, conjecture or speculation. Neither the fact that appellant's condition became apparent during a period of employment nor the belief that his or her condition was caused, precipitated or aggravated by his or her employment is sufficient to establish causal relationship.<sup>10</sup>

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<sup>7</sup> *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

<sup>8</sup> *Id.*

<sup>9</sup> See *Michael E. Smith*, *supra* note 4.

<sup>10</sup> See *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

## **LEGAL PRECEDENT -- ISSUE 2**

Under section 8128(a) of the Act,<sup>11</sup> the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulation,<sup>12</sup> which provides that a claimant may obtain review of the merits of his or her written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence which:

“(i) shows that [the Office] erroneously applied or interpreted a specific point of law; or

(ii) advances a relevant legal argument not previously considered by the [Office]; or

(iii) constitutes relevant and pertinent new evidence not previously considered by [the Office].”

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.<sup>13</sup>

## **ANALYSIS -- ISSUE 2**

Appellant’s November 17, 2003 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law. Additionally, appellant did not advance a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2). With respect to the third requirement, submitting relevant and pertinent new evidence not previously considered by the Office, appellant submitted an MRI scan of the right shoulder dated January 30, 2003; however, this evidence was duplicative of evidence already contained in the record,<sup>14</sup> and was previously considered by the Office in its decision dated October 30, 2003 and found deficient. Also submitted was an MRI scan of the ankle, however, this is not relevant to the issue of the causal relationship of the alleged right rotator cuff tear of January 12, 2003 to employment factors. Therefore, the Office properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

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<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b).

<sup>13</sup> 20 C.F.R. § 10.608(b).

<sup>14</sup> Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case; *see Daniel Deparini*, 44 ECAB 657 (1993); *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

The Board therefore finds that the Office properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2), and properly denied her November 17, 2003 request for reconsideration.

**CONCLUSION**

The Board finds that appellant failed to meet her burden of proof to establish that her right rotator cuff tear was caused by the January 12, 2003 employment incident and that the Office properly denied appellant's request for reconsideration.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 2 and October 30, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 7, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member